

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

BREANN SCALLY,

Plaintiff,

V.

PETSMART LLC,

Defendant.

Case No. 4:22-cv-06210-YGR

ORDER COMPELLING ARBITRATION

Re: Dkt. No. 14

Plaintiff BreAnn Scally, individually and on behalf of similarly situated current and former employees of defendant PetSmart LLC (“PetSmart”), filed a putative class action against defendant in California state court, asserting various violations of the California Labor Code, and additional claims under California’s Unfair Competition Law, Rosenthal Act, Consumer Legal Remedies Act, and False Advertising Law. Defendant timely removed the case to federal court and shortly thereafter filed the pending motion to compel arbitration of plaintiff’s claims, which defendant argues is required by the terms of a duly enacted arbitration agreement between the parties.

Having carefully considered the pleadings and briefing, and for the reasons set forth below, the Court **GRANTS** defendant's motion, arbitration is **COMPELLED**, and the action is **STAYED** pending completion thereof. The Court, however, **ORDERS** the cost-splitting provision of the underlying arbitration agreement **SEVERED** prior to the case being sent to arbitration.

I. BACKGROUND

To expedite the issuance of this Order, the Court assumes Parties' familiarity with the underlying facts.

II. LEGAL FRAMEWORK

Neither party disputes the application of the Federal Arbitration Act (“FAA”). The FAA provides, at Section 2, that an arbitration agreement “shall be valid, irrevocable, and enforceable,

1 save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise
2 provided” by the statute.¹ 9 U.S.C. § 2. “In deciding whether to compel arbitration under the FAA,
3 a court’s inquiry is [therefore] limited to two gateway issues: (1) whether a valid agreement to
4 arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.” *Lim v.*
5 *TForce Logistics, LLC, et al.*, 8 F.4th 992, 999 (9th Cir. 2021) (internal quotations & citation
6 omitted). An agreement that satisfies these conditions will be enforced. *Id.*

7 III. ANALYSIS

8 A. Choice of Law

9 Parties acknowledge the PetSmart Dispute Resolution Policy (“DRP”) contains a choice of
10 law provision, purporting to require this Court to apply Delaware law. In relevant part, the provision
11 reads:

12 To the extent that state law is applicable under the FAA and/or the Convention [on the
13 Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq.*], and/or in
14 the event a court of competent jurisdiction holds or decides that this DRP and/or its Waiver
15 Provisions are not subject to and governed by the FAA, then the laws of the State of
16 Delaware, where PetSmart LLC is incorporated, will be the applicable state law, as
17 applicable and without regard to or application of any conflict of laws principles

18 (Dkt. No. 14-2, Defendant’s Motion to Compel Arbitration, Exh. 1, PetSmart DRP (hereinafter, the
19 “DRP”) at § 20.) The choice of law provision is not a model of clarity. The Court interprets the
20 provision to require the application of Delaware law where “state law is applicable under the FAA,”
21 such as here. (*Id.*) The Court then proceeds to analyze whether the parties’ agreement to apply
22 Delaware law is enforceable.

23 In doing so, the Court applies the choice of law principles of California, “the state in which
24 it sits.” *Saravia v. Dynamex*, 310 F.R.D. 412, 418 (N.D. Cal. 2015) (citing *Bassidji v. Goe*, 413 F.3d
25 928, 933 (9th Cir. 2005)). “Under California law, a contractual choice-of-law provision should be
26 enforced if: (i) the chosen state’s law has a ‘substantial relationship’ to the parties or the transaction,

27 ¹ See *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1259 (9th Cir. 2017) (“The final
28 clause of § 2, generally referred to as the savings clause, permits agreements to arbitrate to be
invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability . . . ”) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)) (internal quotation
marks omitted)).

(ii) the forum state has no ‘fundamental policy’ that is inconsistent with the chosen state’s law, and
(iii) even if such a fundamental conflict exists, the provision should nevertheless be enforced unless
the forum state has a ‘materially greater interest’ in the resolution of the matters at issue.” *Id.* at 418-
19 (quoting *In re Vortex Fishing Sys., Inc.*, 277 F.3d 1057, 1069 (9th Cir. 2002)).

The Court applies this standard to the underlying dispute. Since PetSmart is incorporated in Delaware, there is a substantial relationship with Delaware under part (i) of the test. *See Nedlloyd Lines B.V. v. Super. Ct.*, 3 Cal.4th 459, 467 (1992). Under part (ii), California has well-established, fundamental public policies in support of employees, including in the arbitration context. Under *Armendariz v. Foundation Health Psychcare Servs., Inc.*, for instance, companies that impose mandatory arbitration agreements on their employees are prohibited from making it more costly to pursue arbitration than filing a civil action. 24 Cal.4th 83, 110-11 (2000). In the absence of a similarly strong public policy in Delaware, the Court finds California's strong public policies in the employment arbitration context are contrary to Delaware's approach to similar legal questions. Since, under part (iii) of the test, plaintiff lives in California, worked at PetSmart store in California, and all at-issue conduct occurred in California, the Court finds California has a materially greater interest in the resolution of the instant case than Delaware. (*See generally* Dkt. No. 1-2, Decl. of Megan Cooney in Support of Defendant's Notice of Removal, Exh. B, Class Action Complaint (“CAC”) §§ 46-64.) California law, not Delaware law, therefore controls.

B. Unconscionability

The Court turns next to plaintiff’s arguments seeking to block enforcement of the DRP as unconscionable under California law. The analysis proceeds in two steps. *First*, under the United States Supreme Court’s holding in *Rent-A-Center*, we consider whether plaintiff has alleged the clause delegating questions of arbitrability to the arbitrator is unconscionable. *Second*, the Court considers whether any of plaintiff’s unconscionability arguments concern “Excluded Disputes,” which the DRP prohibits the arbitrator from considering and which are therefore for the Court to assess. (See DRP § 4 (defining “Excluded Disputes”).)

111

111

1 *i. Delegation Clause*

2 Where plaintiffs do not allege with specificity that *the delegation clause* in an arbitration
3 agreement is unenforceable, the Court will enforce the clause as written.² *Rent-A-Center, West, Inc.*
4 *v. Jackson*, 561 U.S. 63, 71 (2010). Allegations that the arbitration agreement *as a whole* is
5 unconscionable are not sufficient to render a delegation clause void for unconscionability. *See id.* at
6 70 (“[A] party’s challenge to another provision of the contract, or to the contract as a whole, does
7 not prevent a court from enforcing a specific agreement to arbitrate.”) Here, the Court understands
8 plaintiff to assert that the arbitration agreement’s cost-splitting provision makes the delegation
9 clause unconscionable.³ (*See* Dkt. No. 24, Plaintiff’s Opposition to Defendant’s Motion to Compel
10 Arbitration (“Opp’n”) at 14:14-15 (“Both the delegation provision and the [agreement] generally
11 contain numerous unconscionable terms[,]” such as the cost-splitting provision); *see also id.* at
12 17:13-14 (arguing “the cost-splitting provision, as applied to the delegation clause [as well as the
13 contract as a whole], [is] unconscionable under California law”) (citation omitted) (alteration in
14 original) .) The Court therefore examines the potential procedural and substantive unconscionability
15 of the provision.

16
17 ² Parties to an arbitration agreement can delegate to an arbitrator the authority to assess the
18 arbitrability of an agreement so long as the delegation is made “*clearly and unmistakably*.” *Lim*, 8
19 F.4th at 999-1000 (quoting *Brennan v. Opus Bank*, 796 F. 3d 1125, 1130 (9th. Cir. 2015))
20 (emphasis in original). A clause that expressly delegates such authority to the arbitrator, “*i.e.*, a
21 delegation clause,” is one way to satisfy this threshold. *Id.* at 1000 (citation omitted). That the
DRP contains a viable delegation clause which clearly and unmistakably delegates authority to the
arbitrator to consider certain arguments about the DRP’s enforceability does not appear to be in
genuine dispute.

22 ³ Plaintiff advances two other arguments which fail to persuade. *First*, she asserts that
23 PetSmart imposes “[o]ne-sided arbitration” on employees (*see Opp’n* at 17:21-18:17) by
24 packaging the DRP together with PetSmart’s Training Repayment Agreement Provision, a
separate contract the company enters into with employees who enroll in the Grooming Academy.
CAC ¶ 3. This document is not part of the DRP and is therefore not presently at issue.

25 *Second*, plaintiff alleges the DRP is unconscionable because it “prohibits the use of
26 arbitrators from AAA or JAMS, which are two of the most well-established arbitration providers
27 in the country.” *Opp’n* at 18:19-20. This argument appears to be a red herring. Indeed, plaintiff’s
analysis of this claim essentially parrots her earlier argument that the DRP’s cross-splitting
provisions are unconscionable and that limitations on the selection of arbitrators further erodes
claimants’ due process rights. *Id.* at 19:1-3. The Court assesses plaintiff’s arguments regarding the
cost-splitting provisions on the merits *infra*.

1 **Procedural Unconscionability.** “The oppression that creates procedural unconscionability
2 arises from an inequality of bargaining power that results in no real negotiation and an absence of
3 meaningful choice. Oppression can be established by showing the contract was one of adhesion or
4 by showing from the totality of the circumstances surrounding the negotiation and formation of the
5 contract that it was oppressive.” *Lim*, 8 F.4th at 1000 (internal quotations & citations omitted). Here,
6 while the DRP contains an opt-out provision and states that prospective employees can seek to
7 negotiate the agreement by contacting PetSmart’s General Counsel, PetSmart has proffered no
8 evidence that the existence of these terms creates opportunities for “real negotiation” and
9 “meaningful choice” for employees. (*See* DRP § 21.) For instance, PetSmart does not allege whether
10 any employees have ever negotiated the terms of the DRP or made use of the opt-out provision.
11 Further, the online job application system through which prospective employees access the DRP is
12 configured such that applicants **must** accept the terms of the arbitration agreement as-is to submit
13 their job application. (Dkt. No. 14-1, Decl. of Jennifer Offner⁴ in Support of Defendant’s Motion to
14 Compel Arbitration (“Offner Decl.”) ¶¶ 9-10.) The Court finds the lack of evidence that the opt-out
15 and negotiation provisions have ever been utilized, the fact that prospective employees are unable
16 to submit their job application without agreeing to the arbitration agreement, and the unique
17 pressures implicated by preemployment arbitration agreements⁵ together evince an oppressive
18 power imbalance that creates at least moderate procedural unconscionability.

19 **Substantive Unconscionability.** California has a long-standing public policy against the
20 imposition of fee-based barriers to employees vindicating their rights through arbitration. *See*
21 *Armendariz*, 24 Cal.4th at 110-11 (“[W]hen an employer imposes mandatory arbitration as a
22 condition of employment, the arbitration agreement or arbitration process cannot generally require

23
24 ⁴ Jennifer Offner is identified as the Director, Field HR-Store Operations & Services, Vet
Health Services for PetSmart. Offner Decl. ¶ 1.

25 ⁵ *See Carbajal v. CWPSC, Inc.*, 245 Cal.App.4th 227, 243 (Cal. App. 2016) (“As the
26 [California] Supreme Court repeatedly has explained, ‘in the case of preemployment arbitration
27 contracts, the economic pressure exerted by employers on all but the most sought-after employees
28 may be particularly acute, for the arbitration agreement stands between the employee and
necessary employment, and few employees are in a position to refuse a job because of an
arbitration requirement.’”) (quoting *Armendariz*, 24 Cal.4th at 115).

1 the employee to bear any *type* of expense that the employee would not be required to bear if he or
2 she were free to bring the action in court.”) (emphasis in original). The Ninth Circuit has similarly
3 held, applying California law, that substantive unconscionability exists when a fee-shifting clause
4 creates for employees a greater financial risk in arbitration claims than they would face if they
5 were to litigate those same claims in federal court. *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1004
6 (9th Cir. 2010). Indeed, “district courts have [also] found cost-splitting provisions in employment
7 arbitration agreements substantively unconscionable because the employer generally has far
8 greater resources and the employee should not be required to pay for the opportunity to present
9 claims—especially where employees would not bear those costs in federal court.” *See Lim*, 8 F.4th
10 at 1002 (collecting cases). Here, the adhesion-like arbitration agreement contains cost-splitting
11 provisions requiring parties to split arbitration costs unless the arbitrator determines plaintiff is
12 incapable of paying such costs and adjusts the cost-splitting arrangement accordingly. (*See DRP §*
13 16.) In other words, she must accept that she could be saddled with immense fees in order to then
14 argue to the arbitrator that assessing such fees would be unjust.⁶ This is a bald attempt to chill
15 PetSmart employees’ efforts to hold their employer accountable and cannot stand.⁷ The Court
16 therefore finds significant substantive unconscionability in the form of the cost-splitting
17 provisions. As the provision is found both procedurally and substantively unconscionable, it is
18

19 ⁶ Defendant contends plaintiff has not sufficiently pled that initiating arbitration against
20 PetSmart would involve payment of high fees and, relatedly, that Ms. Scally cannot afford such
21 fees. *See Dkt. No. 27*, Defendant’s Reply in Support of its Motion to Compel Arbitration (the
22 “Reply”) at 3:20-23. This fails to persuade. Plaintiff includes with her Opposition a declaration
23 from Ms. Scally explaining that she was barely making ends meet while working at PetSmart and
24 earning \$15/hour. Dkt. No. 24-1, Decl. of BreAnn Scally in Support of Plaintiff’s Opp’n ¶ 5. She
25 also “had very little in savings and had significant credit card debt and student debt” at the time.
26 *Id.* at ¶ 4. Ms. Scally therefore asserts, “[t]here is no way I could have afforded to pay for an
27 arbitrator at rates starting at a bare minimum of \$200 per hour plus additional fees and costs, either
28 at the time I applied to PetSmart or while [] working there. If the cost-splitting provision in
PetSmart’s arbitration agreement were enforced, I would not have been able to arbitrate against
them.” *Id.* at ¶ 6. The Court credits Ms. Scally’s allegations on their face and because defendant
has not shown good cause for discounting them. Plaintiff therefore has sufficiently alleged that her
financial circumstances would have limited her ability to arbitrate against PetSmart were the cost-
splitting provision enforced.

29 ⁷ Notably, the American Arbitration Association and JAMS, Inc. limit the fees employees
can be charged for raising a dispute in arbitration. *See Opp’n* at 15:19-21 & n. 7.

1 void as unconscionable.

2 California law affords the Court significant discretion to sever unconscionable provisions
3 from otherwise enforceable contracts. *See Cal. Civil Code § 1670.5(a)* (“If the court as a matter of
4 law finds the contract or any clause of the contract to have been unconscionable at the time it was
5 made the court may refuse to enforce the contract, or it may enforce the remainder of the contract
6 without the unconscionable clause . . .”). The California Supreme Court reaffirmed this
7 discretion, holding that, where an unconscionable “provision can be extirpated from the contract
8 by means of severance or restriction, then such severance and restriction are appropriate.”
9 *Armendariz*, 24 Cal.4th at 124. In the arbitration context, an unconscionable term should generally
10 not be severed, however, if the provision was drafted in bad faith. *Lim*, 8 F.4th at 1005-06. The
11 existence of multiple unconscionable terms in an arbitration agreement is one example of
12 circumstances under which severance may similarly not be appropriate, as doing so could
13 “encourage drafters to overreach.” *Id.* at 1006 (citation omitted). Here, the Court finds the cost-
14 splitting provision unconscionable as applied to the delegation clause. The Court exercises its
15 discretion to sever the cost-splitting provision.

16 *ii. Other Provisions in the Agreement*

17 The Court last considers plaintiff’s arguments concerning Excluded Disputes which the
18 DRP’s delegation clause does not authorize arbitrators to consider.⁸ (*See* DRP at § 4.) These consist
19 of arguments attacking (i) the purported waiver of public injunctive relief and (ii) the mass
20 arbitration provision.

21 **Waiver of Injunctive Relief.** Plaintiff first challenges as unconscionable language in the
22 DRP requiring PetSmart employees to waive their right to bring “representative actions” against the
23 company, which includes actions that “award injunctive relief other than in favor of the Covered
24 Individual or Company seeking such relief . . .” (DRP § 11.) She characterizes this language as
25 constituting a waiver of public injunctive relief in contravention of the California Supreme Court’s

26
27

⁸ *See* DRP § 4 (defining “Excluded Disputes” to include, among other disputes, those
28 concerning the agreement’s representative waivers and mass arbitration provisions).

1 holding in *McGill v. Citibank, N.A.* See 2 Cal.5th 945, 955 (2017) (barring waivers of injunctive
2 relief that have “the primary purpose and effect of prohibiting unlawful acts that threaten future
3 injury to the general public,” as distinguished from “[r]elief that has the primary purpose or effect
4 of redressing or preventing injury to an individual plaintiff—or to a group of individuals similarly
5 situated to the plaintiff”) (internal quotations & citations omitted).

6 In plaintiff’s own words, she “seeks to require PetSmart to stop falsely advertising its
7 training as free to prospective employees, stop falsely representing the Grooming Academy as a
8 legitimate educational institution able to issue enforceable debt, and to comply with the law
9 governing consumer lending disclosures.” (Opp’n at 7:15-18.) As defendant correctly explains,
10 however, only certain *existing* PetSmart employees are eligible to enter the Grooming Academy.
11 (Reply at 6:24-7:8.) The primary beneficiaries of the injunctive relief plaintiff seeks would therefore
12 be a sub-set of current PetSmart employees rather than the general public. Plaintiff’s argument that
13 the instant case implicates *McGill* therefore fails to persuade. See *Hodges v. Comcast Cable*
14 *Communications, LLC*, 21 F.4th 535, 549 (9th Cir. 2021) (holding that relief that did not “primarily
15 benefit the general public as a more diffuse whole” did not constitute public injunctive relief under
16 *McGill*).

17 **Mass Arbitration Provision.** Plaintiff also challenges the DRP’s mass arbitration
18 provision.⁹ The crux of her argument appears to be that the provision operates to restrict employees’
19 choice of counsel when initiating proceedings against PetSmart. (See Opp’n at 5:1-3 (“[T]he [m]ass
20 [a]rbitration provision unilaterally prohibits PetSmart employees from retaining certain legal
21 counsel . . .”); see also id. at 12:12-13 (explaining that the “practical effect [of the provision] is to
22 restrict PetSmart employees from selecting their own employees in arbitration”).) Defendant
23 counters that plaintiff misunderstands the provision, which it contends “provides that when 100 or
24 more arbitration demands asserting the same or similar Covered disputes are made by claimants
25 represented by the same lawyer(s) or law firm(s), the parties will not arbitrate the Covered disputes

26
27

⁹ The Court notes defendant consents to sever the mass arbitration provision to the extent
28 the Court determines the provision is unconscionable. See Reply at 13:27.

1 at issue therein, which instead will be litigated in a court of competent jurisdiction.” (Reply at 10:17-
 2 20) (emphasis in original) (internal quotations & citation omitted). Assuming without deciding that
 3 plaintiff has standing to contest the mass arbitration provision, she does not appear to contend with
 4 the fact that, under the language at issue, “the 101st employee is free to choose whatever counsel she
 5 wants—but if she chooses the same counsel as 100 other employees, the parties will litigate in court,
 6 rather than arbitrate.” (Opp’n at 10:21-23.) This significantly undermines her unconscionability
 7 argument,¹⁰ which the Court declines to credit.

8 For the foregoing reasons, the Court holds that plaintiff has not met their burden to show any
 9 Excluded Disputes are unenforceable

10 **IV. CONCLUSION**

11 For the foregoing reasons, the Court therefore **ORDERS** the cost-splitting provision **SEVERED**
 12 from the DRP. As the Delegation Clause and underlying agreement are otherwise enforceable, the
 13 Court **GRANTS** defendant’s request to compel arbitration on plaintiff’s claims.¹¹

14 The Court **ORDERS** the case **STAYED** pending the outcome of arbitration. However, for
 15 statistical purposes only, the case shall be administratively closed. The Parties shall file a joint status
 16 report within fourteen (14) days from the date of the arbitrator’s order, and if necessary and
 17 appropriate, bring an administrative motion to reopen the case.

18

19 ¹⁰ Plaintiff’s argument that *MacClelland v. Cellco P’ship*, Case No. 21-cv-08592-EMC,
 20 2022 WL 2390997 (N.D. Cal. July 1, 2022), *appeal filed* Case No. 22-16020 (9th Cir. July 13,
 21 2022), requires a different result also fails to persuade. That case concerned, among other
 22 contractual provisions, language in an arbitration agreement that (i) imposed a requirement that
 23 consumers notify defendant of their intent to bring a claim within 180 days of receiving their bill;
 24 and (ii) required arbitrations to proceed in tranches, potentially delaying claimants’ ability to
 25 vindicate their rights. *Id.* at *6-7, *11-14. The *MacClelland* court held the arbitration agreement’s
 26 notice requirement was not quite as “draconian” as a “statute of limitations” limitation but still
 27 created “a potential trap to the unwary that may have the same effect as a short limitations period”
 28 and therefore represents “at least some degree of substantive unconscionability.” *Id.* at *7. The
 requirement that arbitrations proceed in tranches was “pregnant with the risk that
 claims will be effectively barred when coupled with the statute of limitations” and held the
 requirement substantively unconscionable. The mass arbitration provision in the instant case does
 not implicate similarly significant barriers to individuals’ ability to seek relief in the first instance.

¹¹ In doing so, this Court joins at least two other district courts in enforcing the same or similar versions of the PetSmart DRP. *See generally Hampton v. PetSmart LLC*, Case No. 2:22-cv-01079-SB-pVC, 2022 WL 2288308 (C.D. Cal. Mar. 18, 2022); *Rivera v. PetSmart, Inc.*, Case No. 18-2121, 2018 WL 5045380 (E.D. Pa. Oct. 17, 2018).

1 This Order terminates Docket Number 14.

2 **IT IS SO ORDERED.**

3

4 Dated: May 25, 2023

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28


YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT JUDGE